74-1532

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. A-812

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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June 4, 1975

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IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, FRANCIS M. COCKE, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 7, 1974.

OPINION AND JUDGMENTS BELOW

The judgment of the Court of Appeals

for the Ninth Circuit affirming without opinion the judgment and order of the United States District Court, is in the record supplied herewith. The Opinion of the District Court, not yet reported, also appears in such record.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on October 7, 1974. A timely Petition for Rehearing was denied January 8, 1975. An Application for Extension of Time in which to file Petition for Writ of Certiorari was granted by William J. Brennan, Jr., Associate Justice, on the 10th day of April, 1975. The Extension of Time for the Filing of Petition runs to and includes June 7, 1975. This Court's jurisdiction is invoked under 42 U.S.C. Section 1984 and 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether a pro se complaint predicated under the Civil Rights Act, 42 U.S.C. 1981 et seq., should be dismissed with prejudice where the principal relief sought is review and vacation of certain state court orders which constitute denials of due process, because the state courts lacked subject matter jurisdiction over the actions.

2. Whether judicial immunity insulates state judges against suits which seek principally equitable relief under 42 U.S.C 1983, where the state courts lacked subject matter jurisdiction over the actions.

STATUTORY PROVISIONS INVOLVED

The United States Code, Title 42:

Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 1983. Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985(3). If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons

conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1986. Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow,

then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Section 1988. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and dispostion of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

The United States Code, Title 28:

Section 1331(a). The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1343. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any

person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

This action arose out of disputes over the terms and conditions contained in a written escrow agreement for the sale and purchase of land.

Certain land owned by petitioner (F. M. Cocke) and other land held in trust was agreed to be sold under the terms of the agreement to respondent JAMES STEWART COMPANY or its nominee, the respondents HORNE (hereinafter referred to as "Buyers"). Respondent TRANSAMERICA TITLE assumed the

duties of escrow agent and title insurer. After a series of events concerning the escrow terms and conditions, including disputes regarding payment instructions, and disputes as to the identity of parcels excepted from the sale and refusals to execute documents, the Buyers brought an action for specific performance of the agreement against only the named Sellers, F. M. Cocke and Joan H. Cocke (divorced). Joan Cocke is life beneficiary of the trust. James Stewart Co. vs. Cocke, Civil No. C-222472 (Maricopa County, Arizona, Superior Court, filed April 22, 1969). Transamerica has never been joined in Buyers' action.

Along with his answer to Buyers' complaint, F. M. Cocke brought an affirmative action jointly as well as severally against all three of the other parties to the agreement. On motion by Transamerica and over F. M. Cocke's continued objections, the trial court judge severed this action into three separate actions. Following separate and independent proceedings the judge eventually entered separate and independent judgments against F. M. Cocke and in favor of each of the other parties (R. 72, 75, 78 and 83). Each of these judgments altered the agreement.

The altered agreement is sought to be enforced by the Second Amended Judgment entered in favor of the Buyers on September 27, 1972 (R. 83), and by the Order Granting Writ of Assistance and the Writ itself (R. 105, 111), both issued October 31, 1973 under that judgment and allegedly pursuant thereto. No execution to enforce the altered agreement was issued under either the Transamerica or Joan Cocke judgment.

The alteration to the escrow agreement made by the judgment of September 27, 1972,

which in effect deleted its cancellation provisions, was accomplished in the following manner.

The escrow agreement (R. 43, 54), provided that Buyer was to pay, as the first annual installment on the mortgages, $64,000 on January 2, 1969. As provided for in the agreement by its cancellation paragraphs 16, 17 and 18 (R. 48), on March 6, 1969 escrow agent Transamerica gave written notice to Buyer that to avoid cancellation it must comply by March 19, 1969 (R. 63).

The September 27, 1972 judgment "modified" such 13-day period of grace by adding thereto some four years and eight months, allowing compliance by plaintiff Buyers by November 27, 1973, one year after expiration of the 60-day period for appeal.

The last three paragraphs of the September 27, 1972 judgment (R. 91, 92) are quoted here. They establish that the judgment fundamentally altered the escrow agreement, and also that the judgment was on its face patently a conditional judgment, and merely interlocutory.

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all

obligations necessary in accordance with the contract between the parties to convey the subject property;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the plaintiffs' compliance with the terms of said contract as modified hereby.

(emphasis added)

In the next to last paragraph the ordered performance by F. M. Cocke is conditioned upon compliance by plaintiff Buyers with the terms of the original contract of October 9, 1968. In the last paragraph the force and effect of the September 27, 1972 judgment on petitioner's interest in and to the title to the subject property is specifically subjected to, or conditioned on, the plaintiff Buyers' compliance with the terms of the contract "as modified hereby."

It is well settled that a judgment which conditions its force and effect on the performance of certain acts to be done in the future by the parties, as here, remains without force or effect unless and until the conditions are fulfilled. Federal Land Bank of Louisville, Ky., v. Roney, 139 F.2d 175 (7th Cir. 1944), cert. den., 322

U.S. 753, rehearing denied, 323 U.S. 810, held that:

> * * *A judgment which will not become effective unless certain conditions are complied with, or which may be defeated or amended by performance of a condition subsequent, is no bar to a second action on the same subject matter unless it has become absolute by a performance of the conditions in the one case, or failure to perform in the other* * *.

But the fulfillment of the condition specified by the judgment in its last paragraph is itself conditioned on the asserted power or jurisdiction of the court to "modify" the agreement by allowing the extra four years and eight months for the Buyers to comply, which power or jurisdiction it did not and does not have. The relief of alteration of the escrow agreement was not relief which could be granted. Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318, 320 (1967).

After the rendition of this judgment, F. M. Cocke made a Motion To Vacate on the ground of lack of subject matter jurisdiction, which was denied. The Arizona Court of Appeals dismissed the subsequent appeal from the September, 1972 judgment and from the denial of said motion to vacate, on the stated grounds that the appeal was untimely.

F. M. Cocke then filed a Motion For Findings of Grounds upon which the appeal was held to be untimely. He sought a definite ruling as to whether the untimeliness was based (i) on Buyers' claim that the Motion To Vacate was not a proper motion to alter or amend under Rule 59(e) (16 ARS Rule

59(1)), and therefore did not extend the time for appeal, or (ii) on the plain fact, called to the court's attention, that the judgment was conditional. His Motion For Findings was denied.

Thus, the avenue of state court appellate review was effectively impeded or obstructed by unprecedential opinions regarding Rule 59, see Theodoropoulos v. Thompson-Starret Co., 418 F.2d 350, 353 (2nd Cir. 1969), cert. den. 398 U.S. 905, and the finality of judgments. Reed v. Frey, 10 Ariz. App. 292, 458 P.2d 386, 388, 389 (1969), and Burney v. Lee, 57 Ariz. 41, 110 P.2d 554, 556, 557 (1941).

On or about January 14, 1974, F. M. Cocke commenced the instant action against the persons who were parties in his original state action, as well as their attorneys and the state court judges who entered orders and judgments in connection with the various separate actions into which his original state action was split. The federal action is predicated under the Civil Rights Act, 42 U.S.C. Section 1981, et seq (1970). Jurisdiction is predicated on the provisions of 28 U.S.C. Sections 1331 and 1343 (1970).

The action seeks to review and vacate the state court proceedings and judgments heretofore described.

As set forth in the complaint, petitioner seeks relief from the three state court judgments, and the orders issued in execution under one of them, on the grounds that these judgments and orders:

(1) fundamentally alter, and would enforce as so altered, the four-part escrow agreement for the sale and purchase of land;

(2) were based on the asserted power of the state court to bind by judgment a real party in interest, and thus an indispensable party, but not joined in the action, resulting from the state court's splitting of petitioner's affirmative action to enforce the indivisible contract into three separate and independent actions, with separate and independent proceedings and judgments; and

(3) were entered without findings on undisputed documentary evidence presented, which evidence shows that the actual agreement entered into was repudiated, or cancelled under its own specific cnacellation provisions, before the litigation over it began.

It is petitioner's position that these judgments and orders were entered without jurisdiction in the court over the subject matter, on each of the above three grounds, which are designated in the complaint (R. 27-33) as ALTERATION OF CONTRACTS, INDISPENSABLE PARTIES, and WANT OF FINDINGS.

The defendants filed motions to dismiss or for summary judgment and by memorandum and order dated March 4, 1974, these motions in part were granted. While the motions to dismiss for lack of subject matter jurisdiction and res judicata were denied, the motions of all defendants to dismiss for failure to state a claim and of the judges for dismissal on the ground of judicial immunity were granted. The Court of Appeals affirmed on the basis of failure to state a claim upon which relief can be granted.

In later developments in state court, in an attempt to cure the ineffectiveness of their conditional judgment, the Buyers on September 30, 1974 obtained a further order from the same judge (copy added to

record supplied) which found that the above condition specified by the last paragraph of the September 27, 1972 judgment had been fulfilled, and stated at its page 5, line 7:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the closing of Escrow No. 02013111-7 on December 20, 1973 by the TITLE INSURANCE COMPANY OF MINNESOTA pursuant to the Contract and Escrow Instructions entered into on October 9, 1968, as modified by the Judgment entered and filed herein on September 27, 1972 and by Order of this Court on October 31, 1973, and pursuant to the Writ of Assistance issued by this Court on October 31, 1973 is approved and confirmed. . . .

There has never been any finding or order concerning Buyers' compliance with the original contract as made by its parties, so as to fulfill the condition specified by the next to the last paragraph of the judgment.

It appears that the September 30, 1974 order confirmed what was already shown on the face of the earlier record — that the judgment entered September 27, 1972 and the Order Granting Writ of October 31, 1973 were not within the jurisdiction of the court.

REASONS FOR GRANTING THE WRIT

Fairly comprised in the Questions Presented For Review are the following unsettled questions of federal law which appear to merit consideration and settlement by this Court under Supreme Court Rule 19(1)(b).

1. Whether the Civil Rights Act, 42 U.S.C. Sections 1981-1988 permits a federal court to review state court judgments entered in violation of petitioner's right to due process of law.

The lower courts are not in accord as to the merits of this contention. Compare Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969), cert. den. 397 U.S. 1065 (1970) (no jurisdiction to review state court judgment), with Concerned Consumers League v. O'Neill, 371 F.Supp. 644 (E.D. Wisc. 1974) (jurisdiction to review state court judgment).

The Civil Rights Act is plainly intended, among other things, to secure the right to due process of law in the courts to all persons.

In Truax v. Corrigan, 257 U.S. 312, 334 (1921), quoting and following Barbier v. Connelly, 113 U.S. 27, 31 (1885), this Court said:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, . . .that all persons. . .should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; . . .

As here pointed out, the 14th Amendment intended that with respect to access to the courts of the country, for the prevention and redress of wrongs and the enforcement

of contracts, there should be but one class of persons: "all persons".

Likewise, by 42 U.S.C. Section 1981 Congress secured the right to make and enforce contracts, and to due process of law in the courts (by specifying what constitutes such due process), to all persons within the jurisdiction of the United States, so forming but a single class, all members of which have these rights, as intended by the 14th Amendment.

In Cohen v. Norris (9th Cir. 1962), 300 F.2d 24, 29, the court said, referring to Monroe v. Pape, 365 U.S. 167 (1961), and Title 42 U.S.C.:

> In our view Monroe v. Pape announces the rule that an allegation of a purpose to discriminate or a purpose to deprive one of a federal right, is not essential to the statement of a claim under Section 1983 predicated on an alleged violation of the due process clause of the Fourteenth Amendment.

Under this decision, an allegation of discrimination, class-based or otherwise, is not necessary to state a claim under the due process clause.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 15 (1907), quoting its earlier case Scott v. McNeal, 154 U.S. 34, 46 (1894), this Court said:

> No judgment of a court is due process of law, if rendered without the jurisdiction in the court, . . .

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 368, 369 (1936), the Court said:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

The emasculation of these noble tenets by the doctrine of res judicata and so-called principles of federalism should not be countenanced by this Court. The guidelines in the area of civil litigation should be set down plainly by this Court for the lower courts.

2. At least with respect to equitable relief, the doctrine of judicial immunity should not restrict actions under the Civil Rights Act.

The cases are not in accord with this basic proposition. Compare Kinney v. Lenon, 447 F.2d 596 (9th Cir. 1971); Blouin v. Dembitz, 367 F.Supp. 415 (S.D.N.Y. 1973), affirmed 489 F.2d 488 (2d Cir. 1974) (immunity recognized), with Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971); White v. Flemming, 374 F.Supp. 267 (E.D. Wisc. 1974); Mills v. Larson, 56 F.R.D. 63 (W.D. Pa. 1972) (absence of immunity recognized where equitable relief sought).

In O'Shea v. Littleton, 38 L.Ed.2d 674, 687, 688, 94 S.Ct. 669, 414 U.S. 488, 503 (1974), the Court said:

> Whatever may be the case with respect to civil liability generally,

> see Pierson v. Ray, 386 U.S. 547, 18 L.ed.2d 288, 87 S.Ct. 1213 (1967), or civil liability for willful corruption, see Alzua v. Johnson, 231 U.S. 106, 110-111, 58 L.Ed. 142, 34 S.Ct. 27 (1913); Bradley v. Fisher, 13 Wall. 335, 347, 350, 354, 20 L.Ed. 646 (1872), we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . .

Bradley v. Fisher, 13 Wall. 351, 352, and Pierson v. Ray, 386 U.S. 553, 554, 555, which cited and followed it, held that where the court is without jurisdiction over the subject matter, the judge has no immunity from civil liability, as also held in Lucarell v. McNair (6th Cir. 1972), 453 F.2d 836. Alzua v. Johnson specified judicial acts "within the limits of his legal powers and jurisdiction" as a condition to the immunity of the judge. In Bradley v. Fisher, the Court said at 13 Wall. 351, 352:

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

In Lucarell v. McNair, the Sixth Circuit stated:

> Turning to the question of McNair's asserted immunity, it is true that as Referee and Administrative Officer of the Juvenile Court of Trumbull County, McNair was entitled to the full reach of the doctrine of judicial or, in this case, quasi-judicial immunity, and that the doctrine is applicable to actions instituted pursuant to Section 1983. Nevertheless, the doctrine is not without bounds. Some time ago the Sixth Circuit stated its views as to the limits of the protection thus afforded. In Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932), we indicated the view that a judge loses all immunity when he acts in absence of all jurisdiction. This rule was discussed at some length in the more recent case of Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970). See also Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646 (1871) (453 F.2d at 838).

As pointed out in another Court of Appeals' case, Hamilton v. Nakai, 453 F.2d 152, 156 (1972), cert. den. 406 U.S. 945:

> The Supreme Court long ago established the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter:
>
> > "Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the

power to enforce such judgment or decree. (Citations omitted.)

"Express determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record. (Citations omitted.)

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution." (Emphasis added.) Riggs v. Johnson County, 1867, 73 (6 Wall.) U.S. 166, 187, 18 L.Ed. 768.

It appears that if a court is without power or jurisdiction to grant the relief sought, it is without jurisdiction over the subject matter.

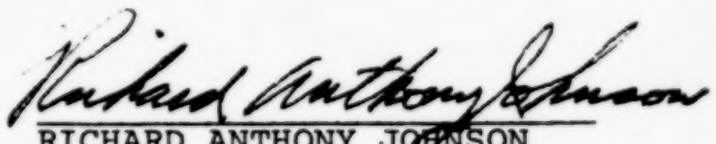
And it therefore appears that where a judge in granting relief sought by one party has deprived the opposing party of a right, privilege or immunity secured by the federal constitution and laws, the much-debated question whether Congress intended by the civil rights acts to abolish the common law immunity of judges becomes moot under the doctrine of Bradley v. Fisher, unless such deprivation be within the power or jurisdiction of the court and can be enforced by due process against the opposing party. Without

the power to enforce such deprivation, by due process, the court is without jurisdiction over the subject matter, and the judge is therefore without immunity.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Ninth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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